Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DAVID WINTERS, *et al.*,
Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,
Appellees.

On Direct Appeal from the Three-Judge Panel in the United States District Court for the Northern District of Illinois

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the tie-breaker provision of the Illinois legislative redistricting scheme, which uses the "random selection" of a biased ninth member to resolve a deadlock of the bipartisan, eight-member redistricting commission, disenfranchises certain members of the electorate in violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the same tie-breaker provision impairs the right to vote in violation of the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

The Appellants are David Winters, Patricia Reid Lindner, J. Bradley Burzynski, Yolanda Campuzano, Armando Cardenas, Guadalupe Garcia, and Willie Jordan, Jr., who were original plaintiffs in the action before the district court, and James 'Pate' Philip and Lee A. Daniels, who intervened as plaintiffs in the district court.

The Appellees are the Illinois State Board of Elections and its Executive Director Ronald D. Michaelson, who were original defendants in the action before the district court, and John Tully and the League of United Latin American Citizens ("LULAC"), who intervened as defendants in the district court.

As each of the Appellants are individual persons and none are nongovernmental corporations, no corporate disclosure statement is required pursuant to Supreme Court Rule 29.6.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The unreported opinion of the three-judge district court denying plaintiffs' motion for judgment on the pleadings is set forth at *Winters v. Illinois State Board of Elections*, Nos. 01 C 50229 and 01 C 6566, 2001 WL 1491581, 2001 U.S. Dist. LEXIS 19335 (N.D. Ill. Nov. 20, 2001) and in the Appendix at A. The opinion and order of the three-judge district court denying plaintiffs' motions to file a second amended complaint and to alter or amend the judgment is set forth in the Appendix at B.

BASIS FOR JURISDICTION

The three-judge district court gave its oral decision on September 28, 2001. The district court entered a written

judgment on October 1, 2001, which is set forth in the Appendix at C. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253. A copy of Appellants' Notice of Appeal, filed on November 27, 2001, is set forth in the Appendix at D.

CONSTITUTIONAL PROVISIONS INVOLVED

The two relevant federal and state constitutional provisions—the Fourteenth Amendment of the United States Constitution and Article IV, Section 3(b) of the Illinois Constitution—are reproduced in the Appendix at E.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In the decision below, a three-judge district court upheld the constitutionality of Article IV, Section 3(b) of the Illinois Constitution, which mandates a winner-take-all redistricting scheme that resorts to chance to select a biased decision-maker to determine the boundaries of Illinois' legislative and representative districts for electing members to the Illinois General Assembly. When the eight-member, bipartisan Illinois Legislative Redistricting Commission (the "Commission") charged with the task of redistricting the state comes to an impasse, which it inevitably does, the Illinois Constitution mandates that a tie-breaking ninth-member be appointed to the Commission.[1] *See* Amended Complaint (hereinafter "Am. Cmplt.") ¶¶ 26-27. After the Illinois Supreme Court chooses two potential candidates—one Republican and one Democrat—the Secretary of State draws the name of the ninth member from a crystal bowl or a replica of Abraham Lincoln's stovepipe hat. *See* Am. Cmplt.

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[1] Because this case was decided on a Rule 12(c) motion for judgment on the pleadings, all facts in the complaint must be taken as true. *See Forseth v. Village of Sussex*, 199 F.3d 363, 368 n.6 (7th Cir. 2000). The district court likewise recognized this fact. *See Winters*, 2001 WL 1491581, at *2.

¶¶ 33-34. The winning party, armed now with a majority of the Commission, invariably passes the partisan map of its choosing, without regard to the views of the party constituting a minority of the Commission or their constituents. *See* Am. Cmplt. ¶ 28. Rather than have the voters determine the balance of power in the General Assembly, Illinois leaves it to the random drawing of a name—and the singularly partisan redistricting that follows—to determine the political party that will control the state legislature for the next decade. *See* Am. Cmplt. ¶¶ 33-34.

This "democracy by lottery" redistricting scheme runs afoul of the Due Process Clause of the Fourteenth Amendment's proscription that government may not deprive the citizenry of basic liberties. The arbitrariness of the Illinois redistricting scheme cannot seriously be disputed—history has proven that once the ninth member is selected, the adoption of the map imposed by the victorious party is *a fait accompli*. *See* Am. Cmplt. ¶¶ 33-34. Thus, whether a Republican or Democratic map is ultimately enacted is left purely to chance, dependent only upon the luck of the draw. The entire system, infected with arbitrariness and chance, violates due process.

Illinois' redistricting process results in the disparate treatment of a class of voters in violation of the Equal Protection Clause of the Fourteenth Amendment. As this Court explained recently in *Bush v. Gore*, 531 U.S. 98 (2000), "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. Illinois' redistricting process does just that; it randomly grants one party the sole authority over redistricting, *see* Am. Cmplt. ¶¶ 33-34, and thereby values the rights of some voters more than others and denies millions of Illinois citizens the right to meaningfully participate in the electoral system. The manner in which districts are drawn dramatically impacts the extent

to which citizens may participate in the electoral process—an incumbent can be "drawn out" of a district; the district can become demographically predisposed to vote for a particular party; and communities may be split apart or held together depending upon the calculation or whimsy of the cartographer's pen. In short, the redistricting process so uniquely affects the right to vote that invoking arbitrary methods that disenfranchise certain members of the electorate in the drawing of districts violates equal protection.

The implications of this Court's decision will go beyond this redistricting cycle of the Illinois General Assembly. History has demonstrated that the random selection of a biased decision-maker through Article IV, Section 3(b) is the way redistricting will be conducted in Illinois. Through the past three redistricting cycles, Illinois voters have had their right to elect candidates of their choice circumscribed through an arbitrary selection of a biased decision-maker. The equal protection and due process guarantees ensure that citizens of Illinois should be afforded no less a democratic form of government than that afforded to citizens of other states. Absent the intervention of this Court, the voting rights of Illinois citizens will continue to be determined in a biased and arbitrary fashion.

Therefore, because Article IV, Section 3(b) of the Illinois Constitution violates both the due process and equal protection clauses of the Fourteenth Amendment, this Court should reverse the three-judge district court's decision and strike Article IV, Section 3(b) as unconstitutional.

II. FACTS PRESENTED TO THE THREE-JUDGE DISTRICT COURT

A. Summary of Illinois' Current Redistricting Process

The Illinois Constitution of 1970 provides the process for redistricting the Illinois General Assembly. Specifically,

Article IV, Section 3(b) states that "[i]n the year following each decennial census year, the General Assembly by law shall redistrict the Legislative Districts and Representative Districts." Ill. Const., art. IV, § 3(b). If a redistricting plan does not become effective by June 30 (of the year following the census year), the Illinois Legislative Redistricting Commission is formed to undertake the task of redistricting. *Id.*

The Commission initially has eight members, selected by the Speaker and Minority Leader of the House of Representatives and the President and Minority Leader of the Senate, each of whom appoint one Senator/Representative and one person who is not a member of the General Assembly. *Id.* Because the eight members are selected by the partisan leadership of the General Assembly, an even split between Democrats and Republicans is guaranteed. *Id.*; *see also* Am. Cmplt. ¶ 25. In fact, Section 3(b) effectively mandates that the Commission be comprised of four Democrats and four Republicans by requiring that "no more than four of [the eight Commission members] shall be members of the same political party." Ill. Const., art. IV, § 3(b); *see also* Am. Cmplt. ¶ 25. The Commission has until August 10 to file a redistricting plan, but because of the even split between the Democrats and Republicans on the Commission, the probability of a deadlock is very high—if not inevitable. *See* Ill. Const., art. IV, § 3(b); *see also* Am. Cmplt. ¶ 26.

When the Commission reaches an impasse and fails to submit a redistricting plan by August 10, the entire process resorts to chance to break the deadlock. *See* Am. Cmplt. ¶ 27. Specifically, Section 3(b) provides:

> If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

> Not later than September 5, the Secretary of State publicly shall draw by *random selection* the name of one of the two persons to serve as the ninth member of the Commission.

Ill. Const., art. IV, § 3(b) (emphasis added); *see also* Am. Cmplt. ¶ 27.

When one of the names is selected, a 5-4 majority—created through the selection of a biased decision-maker purely by chance—ensures one of the parties' total victory. *See* Am. Cmplt. ¶ 28. Where district lines are drawn can dictate the political make-up of the General Assembly. By ensuring the right mix of geography containing historically Democratic and Republican voters, one party or the other can ensure it will win in a majority of the districts.

By October 5, the nine member Commission must file a redistricting plan, approved by at least 5 members. Ill. Const., art. IV, § 3(b); *see also* Am. Cmplt. ¶ 29. The plan "shall be presumed valid, [and] shall have the force and effect of law." Ill. Const., art. IV, § 3(b). Barring further judicial action, defendant Illinois State Board of Elections is required to conduct any future elections pursuant to that map. *See id.*; *see also* Am. Cmplt. ¶ 29.

B. History of Illinois Redistricting Under Section 3(b)

The first time the random selection provision was invoked was in the 1981 redistricting cycle, following the 1980 census.[2] At that point, the political balance of power was

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[2] Section 3 was promulgated pursuant to the Illinois Constitutional Convention of 1970. *See Winters*, 2001 WL 1491581, at *4; *see also* Am. Cmplt. ¶ 24. Since that time, the General Assembly has never agreed upon a redistricting plan, thereby leading to the creation of the Commission during each redistricting cycle. *See* Am. Cmplt. ¶¶ 31-34. Furthermore, the first redistricting cycle in 1971—which directly followed the extraordinary bipartisan effort of creating the 1970 Constitution—

split by chamber, with the Democrats having a majority in the Senate and the Republicans a majority in the House. Not surprisingly, the legislature did not agree on a new map, and the legislative leaders appointed a Commission as provided in the 1970 Constitution. Because the bipartisan Commission could not agree on a new map, the random selection provision of Section 3(b) was implemented. *See* Am. Cmplt. ¶ 32.

As provided by the Illinois Constitution, the Supreme Court submitted the names of two persons "not of the same political party"—former Republican Governor Richard Ogilvie and former Democratic Governor Samuel Shapiro—to be selected at random by the Secretary of State. In a public ceremony, the Secretary of State drew the name of Governor Shapiro out of Abraham Lincoln's stovepipe hat. The Commission, with a 5-4 Democratic majority, drew a map that favored the Democrats and allowed them to retain control of both houses of the General Assembly for the entire decade. *See* Am. Cmplt. ¶ 33.

In 1991, the General Assembly could not agree on a map, the Commission became deadlocked, and the random selection provision was again invoked. The Illinois Supreme Court submitted the names of Albert Jourdan, chairman of the State Republican Party, and former Democratic Supreme Court Justice Daniel Ward. The Secretary of State selected Jourdan's name out of a crystal bowl. With a Republican majority, the Commission adopted a Republican-proposed map that led to Republican control of the Senate for the next decade, and control of the House from 1994-1996. *See* Am. Cmplt. ¶ 34. The process by which the Commission originally adopted a map was condemned by the Illinois Supreme Court and remanded for additional adversarial

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represents the only time redistricting was accomplished without the random selection of a ninth member to the Commission. *See* Am. Cmplt. ¶ 31.

hearings and public comment. *See People ex rel. Burris v. Ryan*, 588 N.E.2d 1023, 1029-30 (Ill. 1991); *see also* Am. Cmplt. ¶ 38.

In 2001, the Illinois General Assembly and the eight member Commission did not produce a map, and the random selection provision was again invoked. The Illinois Supreme Court submitted the names of former Democratic Chicago mayor and Supreme Court Justice Michael Bilandic and former Republican Supreme Court Justice Benjamin Miller. The Secretary of State selected Democrat Bilandic's name from a replica of Abraham Lincoln's stovepipe hat. The Democratic majority on the Commission went on to approve a Democratic map by a 5-4 partisan vote.

III. PROCEEDINGS AND OPINION BELOW

Appellants David Winters, Patricia Reid Lindner, J. Bradley Burzynski, Yolanda Campuzano, Armando Cardenas, Guadalupe Garcia, and Willie Jordan, Jr., originally filed this action on July 17, 2001. A three-judge panel was appointed on August 3, 2001. On August 20, 2001, Appellants filed their first amended complaint, and on September 10, 2000, James 'Pate' Philip and Lee A. Daniels were granted leave to intervene.[3]

On September 18, 2001, the parties filed cross-motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The three-judge panel heard oral argument

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[3] In a related case, Benjamin Barnow filed suit in the Illinois Supreme Court on August 17, 2001, No. 92613, also challenging Section 3(b) as unconstitutional. The Attorney General removed the case to federal court and the three-judge district court hearing *Winters* granted the motion to reassign *Barnow* to the same panel on September 12, 2001. Although the cases were not formally consolidated, the district court heard consolidated oral argument in both cases on September 28, 2001 and issued the same judgment and opinion in both cases on October 1, 2001.

on September 28, 2001, and issued an oral ruling granting defendants' motions that day. The Court issued its minute order and Memorandum Opinion and Order on November 20, 2001. (Appendix at A). Appellants filed their Notice of Appeal on November 27, 2001. (Appendix at D).

REASONS FOR REVERSING THE DISTRICT COURT

The right to vote encompasses more than just the right to walk into a voting booth and pull the lever, check the box, or punch the card. In the seminal reapportionment case of *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555; *see also Bush*, 531 U.S. at 104 ("The right to vote is protected in more than the initial allocation of the franchise."). The Court has repeatedly recognized that the right to vote includes not only the right to cast a ballot, but also the right to have that vote meaningfully counted and, ultimately, the right to fair and effective representation in federal, state, and local government.

The tie-breaker provision unnecessarily impinges on these rights and thus violates the equal protection and substantive due process guarantees of the Fourteenth Amendment. Because the tie-breaker provision impinges on the fundamental right to vote, the district court was required to apply the strict scrutiny standard to the provision, rather than rational basis. Under the strict scrutiny standard, this Court should strike down Section 3(b) as the provision and the classification it creates is not narrowly tailored to any compelling state interest.

I. SECTION 3(b) IMPINGES UPON THE FUNDAMENTAL RIGHT TO VOTE AND IS SUBJECT TO STRICT SCRUTINY

It is clear that this Court has long held that the right to vote is a fundamental right. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (striking apportionment scheme that created a congressional district containing two to three times as many voters as other districts); *see also Reynolds*, 377 U.S. at 561-62 (stating, in striking reapportionment scheme that failed to adequately take population into account, that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating, in the context of holding unconstitutional the administration of an ordinance that discriminated against Chinese-Americans, that "the political franchise of voting is . . . a fundamental political right, because preservative of all rights"). This fundamental right to vote encompasses redistricting matters. *See Reynolds*, 377 U.S. 533 (striking state legislative apportionment plans based on the their impairment of the "constitutionally protected right to vote" in state elections); *cf. Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) ("These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography.").

Because the right to vote is a fundamental liberty interest, a state provision challenged on due process and equal protection grounds as impairing the fundamental right to vote cannot survive unless it can withstand the highest level of constitutional scrutiny. Pursuant to equal protection analysis, this Court has "treated as presumptively invidious those

classifications . . . that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (holding that the Fourteenth Amendment's equal protection guarantee extends to illegal aliens excluded from public schools); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667, 670 (1966) (stating, in striking down poll tax, that the political franchise of voting is a "fundamental political right" and "classifications which might invade or restrain [fundamental rights] must be closely scrutinized and carefully confined" (citations omitted)). Likewise, this Court has held that substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that right to assistance in committing suicide is not a fundamental right); *see also Harris v. McRae*, 448 U.S. 297, 312 (1980) (stating, in the context of finding that withholding federal funds for abortions did not violate a fundamental right, that "[i]t is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional'" (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (plurality opinion))).

Thus, any infringement on the fundamental right to vote via provisions regulating the redistricting process must be reviewed under strict scrutiny. *Plyler*, 457 U.S. at 216-17 n.15 ("With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights."); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (upholding California property tax system); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (stating, in striking down voter residency

requirement for failing to further a compelling state interest, that "before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny" (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970))); *Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basis civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). Under this strict scrutiny standard, the State must demonstrate that Article IV, Section 3(b) of the Illinois Constitution advances a compelling state interest and is narrowly tailored to serve that interest. *Cf. Plyler*, 457 U.S. at 216-17 (classifications must be "precisely tailored to serve a compelling governmental interest"). The State has not met, and cannot meet, this burden.

No one disputes that the State has a compelling interest in seeing that its legislature is reapportioned in compliance with the "one man, one vote" mandate of *Reynolds v. Sims*. *Cf. Winters*, 2001 WL 1491581, at *4 ("No one seriously doubts the State of Illinois has a legitimate interest in legislative redistricting."). However, the State must also demonstrate that the classifications established and the means utilized are narrowly tailored to serve this interest. Thus, while Illinois may have a compelling state interest in legislative redistricting, the tie-breaker provision's random determination of which party redistricts the state is not narrowly tailored to this interest. The State has not attempted to explain how the tie-breaker is narrowly tailored to accomplish the redistricting task, a task which each of the other 49 states also confronts every ten years without resort to a random and arbitrary tie-breaker drawn from a hat, but rather through more narrowly tailored means that do not violate the fundamental right to vote. Indeed, each of the other states that utilize some form of legislative redistricting commission provide for the resolution of any deadlock that

could develop from an even-numbered entity in charge of redistricting by either providing for the initial creation of an odd-numbered entity, *see, e.g.*, Ariz. Const., art. IV, pt. 2, § 1(3); Ark. Const., art. 8, § 1; Colo. Const., art. V, § 48; Del. Const., art. II, § 2A; Haw. Const., art. IV, § 2; Maine Const., art. IV, pt. third, § 1-A; Va. Code Ann. § 24.2-300 (West 2001), or requiring *someone*—whether it be the state supreme court, the governor, or other public figure—to be accountable for selecting the tie-breaker or choosing the plan, *see, e.g.*, Iowa Const., art. III, § 35; Mich. Const., art. IV, § 6; Mont. Const., art. V, § 14(2); Pa. Const., art. II, § 17(b); Wash. Const., art. 2, § 43(6).

In fact, public officials in Illinois have themselves admitted that the random selection of the tie-breaker ninth member is not narrowly tailored to meet the state's compelling interests and have sought to formulate a better redistricting scheme. Following the 1991 redistricting cycle, then Secretary of State George Ryan convened a special commission to review the redistricting process and to suggest changes to the process, if necessary. *See* Report of Redistricting Process Review Commission ("Review Commission"), set forth in the Appendix at F; *see also* Am.Cmplt. ¶ 39. The Review Commission was a bipartisan effort of former legislative leaders, academics, and civic leaders. The Review Commission held twenty-five meetings around the state, which included testimony by leading national experts on redistricting. The Review Commission ultimately proposed the use of a computer program to draw the new districts in the event of an impasse, thereby eliminating the "democracy by lottery" of the current scheme. That the Review Commission's conclusions were not adopted is immaterial to the fact that even the highest ranking state officials admitted that the current process was not narrowly tailored to suit the state's redistricting needs. The Review Commission's

findings themselves are clear evidence that other, more narrowly tailored means do exist. Thus, because this arbitrary redistricting scheme is not narrowly tailored, the Court should declare it unconstitutional and violative of both due process and equal protection.

II. THE DISTRICT COURT ERRED IN FINDING THAT SECTION 3(b) DOES NOT VIOLATE EQUAL PROTECTION OR SUBSTANTIVE DUE PROCESS

Rather than address Section 3(b)'s infringement on the fundamental right to vote and subject it to the strict scrutiny required, the district court held that Section 3(b) does not create a classification in violation of the Equal Protection Clause and does not implicate a "clearly identified" right under the Due Process Clause. The district court's analysis was erroneous and must be reversed.

A. Section 3(b) Violates Equal Protection.

Contrary to the district court's holding, the Equal Protection Clause does apply to this case. Although Section 3(b) does not single out one political party *per se*, it, *by design*, guarantees that one political party and the members of that party will be excluded from the redistricting process. Section 3(b) guarantees that one party will be subjected to the will of the other based upon the random selection of a biased decision-maker. A fair redistricting process would enable citizens of both parties, through their elected representatives, to provide input into the configuration of the new districts. Through an arbitrary process that grants one party the sole authority over redistricting, however, the State values the rights of some voters more than others—namely, those of the chosen party are favored over those of the excluded party.

Such a result is prohibited. This Court has expressly recognized that in the redistricting context, the Equal Pro-

tection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds*, 377 U.S. at 576. "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336; *see also Bush*, 531 U.S. at 105, 107 (holding that vote recount procedures "do not satisfy the minimum requirements for non-arbitrary treatment necessary to secure the fundamental right [to vote]" and "was not a process with sufficient guarantees of equal treatment"); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding, in the context of the government's demand for an easement from a homeowner, that the purpose of the Equal Protection Clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents"); *Plyler*, 457 U.S. at 217 n.15 ("[W]e have also recognized the fundamentality of participation in state elections on an equal basis with other citizens in the jurisdiction." (internal quotations and internal citations omitted)). Illinois' system for redistricting, however, treats similarly situated voters differently, depending upon their political affiliation.

Indeed, at least one circuit court has found that discrimination in election matters on the basis of political affiliation violates equal protection. *See Charfauros v. Board of Elections*, 249 F.3d 941 (9th Cir. 2001). In *Charfauros*, the Ninth Circuit found an equal protection violation in a board of elections' decision to bar voting by those subject to Democratic Party challenges while allowing voting by those subject to Republican Party challenges. The court held that "[p]utting such a price tag on the right to vote—particularly when only an arbitrarily selected few are forced to pay—violates the equal protection clause and is therefore unconstitutional." *Id.* at 954.

The same result should obtain here where the express terms of Section 3(b) operate to arbitrarily exclude one of the two major political parties from participating in the redistricting process.

B. Section 3(b) Violates Due Process.

Also contrary to the district court's holding, the Due Process Clause does apply to this case. The district court improperly held that appellants did not satisfactorily provide a "careful description" of the right asserted and that such a right "must be defined in concrete, specific terms, not abstract generalizations." *Winters*, 2001 WL 1491581, at *3 (citing *Glucksberg*, 521 U.S. at 721-22). Even if such a "careful description" is required, appellants have satisfied their burden. Appellants have amply demonstrated that the random selection of the tie-breaker determines which party redistricts the state, thereby directly impacting the right to vote of each citizen in Illinois. As this Court has long held, the right to vote is a fundamental right, *see Reynolds*, 377 U.S. at 561-62 ("[T]he right of suffrage is a fundamental matter in a free and democratic society."), and the redistricting process directly impacts the right to vote, *see id.*; *Buckley*, 424 U.S. at 49 (noting that reapportionment decisions serve to assure each citizen an equal right to vote). Thus, the redistricting process and the selection of a biased decision-maker that dictates the process' conclusion is not "abstractly" related to the fundamental right to vote, but rather is integral in determining the extent to which any single vote can truly influence representative government.

The district court also improperly applied a rational basis test to the infringement of a fundamental right.[4] The district

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[4] The district court considered the possibility of applying an intermediate scrutiny standard found in ballot access and election procedure cases. These cases focus on state regulation of the place, time, and manner of holding elections, and the rationale for intermediate scrutiny of such regulations is based on the presumption that, although "voting is of

court found that the random selection of a tie-breaker pursuant to Section 3(b) was rationally related to an important state interest by accepting the rationale of the framers at the 1970 Illinois Constitutional Convention. The framers, in drafting Section 3(b) and the ninth member "doomsday" clause, believed that no party would risk losing it all for the even chance of winning it all. As the district court noted, the framers "believed it would give both political parties an incentive to compromise because neither side would want to risk losing the random drawing." *Id.* at *4. But as the district court also admits, the framers were wrong, because this is exactly the risk the parties have taken in each of the redistricting cycles since 1980. *Id.* ("History proves it has had just the opposite of its desired effect. Rather than forcing the parties to find common ground for fear of losing the random drawing, they are apparently willing to dig in their heels with the hope of winning the draw.") What once may have been rational has, through history, been proven irrational. Thus,

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the most fundamental significance under our constitutional structure[,] [i]t does not follow . . . that the right to vote in any *manner* and the right to associate for political purposes through the *ballot* are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (emphasis added) (citations omitted) (holding that ban on write-in voting did not violate due process). The district court erroneously inferred from these ballot access and election procedure cases that "[i]n recent years, the Supreme Court has backed off somewhat from its strict categorical approach to the right to vote." *Winters*, 2001 WL 1491581, at *3.

Any possible guidance the district court may have gathered from the ballot access and election procedure cases is inapplicable to the issue of whether Section 3(b) violates the fundamental right to vote. However, even under *Burdick*'s balancing approach, Section 3(b) still fails to pass constitutional muster. Had the district court properly applied the *Burdick* balancing test, it would have weighed the severe infringement on the right to vote against the state's interest in having a redistricting plan expeditiously approved via the random selection of a tie-breaker and would have found that the state's interest does not and cannot outweigh the severe restriction on Illinois citizens' right to vote and have their votes count in a meaningful way.

the statute fails to pass even a rational basis analysis, let alone the narrowly tailored requirement under strict scrutiny.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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